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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

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In re C.L. et al., Persons Coming Under the Juvenile  
Court Law.

C088252

EL DORADO COUNTY DEPARTMENT OF  
HUMAN SERVICES & CHILD PROTECTIVE  
SERVICES,

(Super. Ct. Nos.  
SDP20170037,  
SDP20170038)

Plaintiff and Respondent,

v.

L.L.,

Defendant and Appellant.

Father of the minors C.L. and B.L. (minors) appeals from the juvenile court's October 24, 2018, orders terminating parental rights under Welfare and Institutions Code section 366.26.<sup>1</sup> He contends the orders must be reversed and the earlier July 11, 2018, orders finding the parental bond exception applicable (§ 366.26, subd. (c)(1)(B)(i)) must

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<sup>1</sup> Further undesignated statutory references are to the Welfare and Institutions Code.

be reinstated. The El Dorado County Department of Human Services and Child Protective Services (Department) argues the matter should be reversed and remanded for a new section 366.26 hearing.

We find the ongoing section 366.26 proceedings were stayed at the time the October 24, 2018, findings and orders were entered. Therefore, we shall vacate the October 24, 2018, orders for lack of jurisdiction and remand for new section 366.26 proceedings.

## **I. BACKGROUND<sup>2</sup>**

This case is an unusual one with countless procedural twists and turns which we endeavor to recount here.

### ***Detention, Jurisdiction, and Disposition***

On October 24, 2017, the juvenile court ordered the minors (ages 16 months and 3 years) detained. On December 6, 2017, the court took jurisdiction over the minors pursuant to section 300, subdivisions (b) and (j), bypassed services for the parents pursuant to section 361.5, subdivisions (b)(1) and (b)(13), and set the matter for a section 366.26 hearing. The court also suspended visitation pending parents' contact with the Department. On March 5, 2018, the minors were moved to a prospective adoptive home. The Department's adoption assessment concluded the minors were generally adoptable.

### ***July 11, 2018, Commencement of Contested Section 366.26 Hearing***

On July 11, 2018, the parties signed and filed a stipulation consenting to the appointment of Commissioner Douglas R. Hoffman as temporary judge in the dependency proceedings. At the July 11, 2018, contested section 366.26 hearing (Commissioner Hoffman presiding), father testified regarding his relationship and visitation with the minors, including that he had visited with the minors once every

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<sup>2</sup> A detailed recitation of the facts underlying the dependency petition is unnecessary for resolution of this appeal.

month for the past seven months and only missed one visit. The Department recommended that the court find both minors generally adoptable, find the parental bond exception did not apply, and terminate parental rights.

Contrary to the Department's recommendation, the juvenile court found the parental bond exception applied, finding father had participated in regular visitation over the past seven months, there was a bond between father and the minors, and it would be detrimental to the minors if father's parental rights were terminated. The court also "offer[ed] services." The Department informed the court this was "not permissible for the Court at this stage," and the only option available to the court, if it decided not to terminate parental rights, was to choose an appropriate permanent plan. The court stated it would not terminate father's parental rights, reiterating it would be detrimental to do so. Following an unrecorded discussion with counsel at the bench, the court stated, "Guardianship or long-term foster care is in the best interest of the children. I'm finding that basically the father's bond is based upon his testimony in court today and the relationship he has and the children's reactions when he visits with the children. [¶] It's evident to me children of this age are doing the best they can to show their attachment to their father in the visitation setting that he is currently in." The Department asked the court whether it was implementing a permanent plan of guardianship or long-term foster care, to which the court responded, "The plan would be for either. Which do they qualify for? Is there a guardian available?" The Department informed the court the minors were in a concurrent home willing to provide permanency in the form of adoption. Father's counsel indicated he would be filing a section 388 motion and questioned whether it might be necessary to continue the matter to see if the current caretakers were interested in guardianship.

Minors' counsel, joined by the Department, objected to the court's decision, arguing it was neither supported by the law nor by the evidence and it left the minors in an impermanent situation. The Department noted the decision created further instability

in the minors' lives and requested that the matter be continued for a week to allow the Department to meet with the current home caretakers and determine what permanent plan could be established for the minors. Minors' counsel objected to a continuance stating, "No. I think the Court needs to make the finding. Let's make the finding, because a Notice of Appeal needs to be filed and/or whatever other post—post-judgment remedy is available. This needs to be done now." Minors' counsel added, "The Court heard the evidence. It is the Court's duty today to make a finding of a permanent plan."

Mother's counsel argued the court could make whatever findings it deemed appropriate or ask the Department to investigate the current placement to determine their willingness to do a guardianship, adding, "You know, the Department, I think, has the obligation to assess these from all points of view, and at this point all we have is the point of view of adoption, so I think it's appropriate to put it over and find out what we're doing."

The court confirmed guardianship as the permanent plan, *but continued the hearing one week to explore placement options*. The court's written minute orders state the court "does not terminate parental rights at the time to further explore other placement options," and set the matter for a continued hearing on July 18, 2018, for "consideration of permanent plan placement" (emphasis omitted).

The following day, minors' counsel filed notices of appeal of the court's July 11, 2018, orders.

### ***Father's Section 388 Petition***

On July 16, 2018, father filed a petition pursuant to section 388 seeking an order for reunification services or return of the minors to him with an order for family maintenance services. The matter was set for hearing on July 18, 2018.

***July 18, 2018, Continuation of Section 366.26 Hearing and Minors' Motion to Withdraw Stipulation***

At the July 18, 2018, hearing (Commissioner Hoffman presiding), minors' counsel informed the court of the filing of the minors' appeal of the July 11, 2018, findings and orders. Minors' counsel also filed a motion to withdraw the July 11, 2018, stipulation authorizing Commissioner Hoffman to hear the dependency matter, arguing in part that counsel "[did] not believe the Court underst[ood] the nature of the hearings and the standards of law in this matter and as such any rulings made would not be in the best interests of the minor children." Father's counsel noted he filed a section 388 petition. When the court asked whether the matter should be continued, the Department and minors' counsel stated the motions could be considered later but the underlying hearing regarding the section 366.26 findings needed to be completed. The court indicated it was not prepared for the section 366.26 hearing because the files had been sent to the appellate department as a result of the minors' appeal. The court stated, "So my understanding was what we are on for today was the request to change the court orders, and now we have a notice of motion to withdraw the stipulation authorizing a temporary judge. [¶] So what do you want to do today?" The following colloquy took place between the court and counsel:

“[MOTHER’S COUNSEL]: I thought we made all the [section 366].26 orders last week. We didn’t ?

“[DEPARTMENT]: No.

“[FATHER’S COUNSEL]: I think one of the issues that arose last week was that the permanent plan as set forth by the Department was adoption, and the report reflected the current placement’s desire to be the adoptive placement. [¶] My review of the minute orders indicate[s] that today’s hearing is for consideration of permanent plan placement. I don’t know if it had to do with whether or not the current caregivers wanted to proceed, given the Court’s ruling, not going forward with adoption. I don’t know if

that was a piece that we were going to address today, but that's what the minute order says that I'm looking at.

“[MINORS’ COUNSEL]: And that’s what the minute order says, but I think whatever the current placement wants or doesn’t want is irrelevant. I don’t—I don’t know what the —

“[DEPARTMENT]: In one sense, it is irrelevant. In the other sense, it is relevant in that the current placement is not willing to provide permanency in the form of a guardianship. They were willing to provide permanency in the form of adoption so —

“[COURT]: And I believe I ordered guardianship, correct?

“[DEPARTMENT]: Correct, but we do not have an identified guardian for these children, Your Honor, so if the Court’s order continues to be the guardianship, the plan for these children, they will need to be removed from the current caretakers, and I would request an evidentiary hearing on that issue.

“[FATHER’S COUNSEL]: And Father does have family that can be assessed by the Department. [¶] Also, Father’s [section] 388 [motion] specifically addresses placement of the children and services. [¶] So I don’t know if it makes sense to put it over for a ruling on [minors’ counsel’s] motion and then hear the merits of the [section] 388 [motion].

“[DEPARTMENT]: I don’t want to address any of the merits of the [section] 388 [motion] —

“[MINORS’ COUNSEL]: Correct.

“[DEPARTMENT]: —given the motion [to withdraw the stipulation] by [minors’ counsel].

“[MINORS’ COUNSEL]: Correct. I agree.”

The court asked whether it made sense to continue minors’ motion to withdraw the stipulation to the following week and have the other matters trail. Minors’ counsel informed the court that the motion should be heard by another judge pursuant to the

applicable California Rules of Court. After some further discussion, the court stated it would refer the motion to withdraw to the presiding judge for assignment and continue to trail the other matters pending resolution of that motion. The court's written minute orders memorializing the hearing and referring the matter to the presiding judge for reassignment were not filed until August 8, 2018.

***July 31, 2018, Ex Parte Minute Orders Reassigning Dependency Matter***

On July 31, 2018, the court (Judge Suzanne N. Kingsbury presiding) issued ex parte minute orders stating the matter had been referred to the presiding judge, who ordered the matter reassigned to Department 4.

***August 1, 2018, Ex Parte Section 366.26 Minute Orders***

On August 1, 2018, the court (Commissioner Hoffman presiding) issued ex parte minute orders regarding the July 11, 2018, section 366.26 hearing stating the court had found the parental bond exception applied pursuant to section 366.26, subdivision (c)(1)(B)(i). The orders further stated the court "did not terminate the parental rights of either parent, and the Department's offer to have the matter continued one week to meet with the concurrent home and determine what permanent plan can be established for the children was accepted [citation]. The court recommended that a guardianship be considered. [¶] . . . [¶] The gist of the Court's orders were [sic] that the exception applied, the department would have time to formulate a new plan with guardianship as the court's indicated preference, and that the motion to be filed by father was to be heard. The Court did not conclude the Finding[s] and Orders required for the [section] 366.26 hearing, anticipating that the Department would prepare new orders consistent with the Court's indicated ruling for the court to review and announce at the continued hearing. [¶] . . . [¶] . . . The continued hearing of July 18, 2018 was to complete the Findings and Orders required for the [section] 366.26 hearing in light of the court's ruling, to have the Department report on a new plan (adoption having been suggested) and to address Father's [section] 388 petition. The filing of the *Motion to Withdraw Stipulation* had side

tracked the proceedings without the court making the necessary record of findings and orders from the [section 366].26 hearing. [¶] On 7/31/18, the case was assigned to Department 4 . . . . The court has not yet completed the ruling on the [section] 366.26 hearing or on the motion under [section] 388.”

***August 2, 2018, Withdrawal of Stipulation for Appointment of Commissioner Hoffman***

At the August 2, 2018, hearing (Judge Jerald M. Lasarow presiding), the court granted the minors’ motion to withdraw the stipulation for appointment of Commissioner Hoffman. The parties argued again about whether all the required section 366.26 findings and orders had been made and entered at the July 11, 2018, hearing. The matter was set for a continued hearing on father’s section 388 petition.

***September 12, 2018, Stay of Proceedings***

At the September 12, 2018, hearing on father’s section 388 petition (Judge James LaPorte presiding), the court questioned whether it was appropriate to rule on father’s section 388 petition given that the issues were similar to those pending in the minors’ appeal of the July 11, 2018, section 366.26 ruling. Minors’ counsel made an oral request for stay of the proceedings in light of the pending appeal. Following argument and a brief recess to allow the parties and the court to conduct research on the issue, *the court granted the minors’ request for stay* without prejudice and continued the matter for further review pending the outcome of the appeal. The court also took judicial notice of the parents’ respective criminal cases.

***September 21, 2018, Ex Parte Section 366.26 Minute Orders***

On September 21, 2018, Commissioner Hoffman signed ex parte minute orders stating as follows: “The court received prepared Orders Under Welfare and Institutions Code Sections 366.24, 366.26, 727.3, 727.31 (JV-320) for review and signature. The Court’s recollection did not comport with the orders that were prepared and submitted. After careful review of the Reporter’s Transcript and the Court’s notes, new Orders were prepared by the court, signed and submitted for filing with the clerk.” (Italics Omitted.)



The “new Orders” referred to two judicial council form JV-320 orders (one for each minor) which purported to memorialize the July 11, 2018, section 366.26 hearing and which included a finding that termination of parental rights would be detrimental to the minors. Both orders stated the “hearing is continued for one week to July 18, 2018 . . . for the [D]epartment to present consideration of a permanent plan other than adoption with the court suggesting guardianship. The [D]epartment to contact the present caregivers to determine if they would be willing to be guardians. The balance of the court orders for the [section] 366.26 hearing to be concluded on that date, as well as the [section] 388 motion Father’s attorney indicates will be filed to be considered on that date as well.” The order referencing C.L. was signed by Commissioner Hoffman. The order referencing B.L. did not include a signature page and was not otherwise signed by Commissioner Hoffman.

***October 17, 2018, Continued Section 366.26 Hearing***

Commissioner Hoffman presided over the October 17, 2018, hearing, giving a detailed summary of the previous proceedings as set forth in his August 1, 2018, minute orders and reiterating he had not yet completed the necessary findings and orders on the section 366.26 hearing or on father’s section 388 petition, now stayed. Over father’s objection, the court found that the purpose of the hearing was a “continued [section 366].26 hearing” and the court was therefore not disqualified from considering new information regarding father’s criminal case received after the July 11, 2018, hearing. The court took judicial notice of father’s pending criminal cases. After discussion and argument regarding proper notice to the parents, the court’s authority to consider new information, and whether the court was disqualified from conducting the hearing or making new or different orders, the parties eventually stipulated to a continuance of the matter to October 24, 2018, to complete the section 366.26 orders initiated on July 11, 2018. Notice of the continued section 366.26 hearing was served on the parents. The court’s October 17, 2018, minute order stated, among other things, that the section 366.26

hearing was continued to October 24, 2018, and “Commissioner Hoffman has been disqualified to hear any and all future hearings beyond the [section] 366.26 hearing.”

***October 24, 2018, Motions to Disqualify and Continued Section 366.26 Hearing***

On October 24, 2018, father and mother filed separate motions to disqualify Commissioner Hoffman pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6)(C).

The October 24, 2018, continued hearing (Commissioner Hoffman presiding) commenced with all parties present with counsel. The court noted the hearing was a continued section 366.26 hearing, pointed out that father had been arrested on new charges and both parents were in custody, and stated its intention to go forward with the hearing despite the parents’ pending disqualification motions.

Mother’s counsel argued findings and orders for a permanent plan of guardianship had already been made on July 11, 2018. Minors’ counsel argued the court’s finding regarding applicability of the parental bond exception was not supported by the evidence. Father’s counsel objected to the court’s consideration of his custodial status and criminal proceedings as irrelevant and further objected to the court making any findings given father’s pending motion to disqualify. The Department argued the court had the authority to “reconsider” its July 11, 2018, rulings regarding whether the parental bond exception applied.

On its own motion, the court revisited its prior July 11, 2018, rulings regarding the parental bond exception and concluded the exception did not apply, finding that while father satisfied the first prong regarding regular visitation and contact with the minors, the court was incorrect in determining father satisfied the second prong of the exception and there “[wa]sn’t sufficient evidence in the record for a parental bond.” In making these findings, the court remarked that the parents’ criminal proceedings had not influenced its determination of the issues. The court further found the minors adoptable, terminated parental rights, and identified adoption as the permanent plan.

Father filed a timely notice of appeal from Commissioner Hoffman's section 366.26 orders.

## **II. DISCUSSION**

### **A. *Contentions***

Father raises a variety of issues. He contends the court erred in terminating his parental rights because: (1) father did not receive prior notice that the issue of his parental rights was pending at the October 24, 2018, hearing; (2) Commissioner Hoffman, who presided over the dependency proceedings pursuant to the parties' stipulation, no longer had authority to hear and determine the contested issues given his disqualification by minors' counsel; (3) the court did not have authority to make findings while father's Code of Civil Procedure section 170.1 motion to disqualify was pending; (4) the court had no authority to conduct the October 24, 2018, "rehearing" of the earlier July 11, 2018, hearing; (5) father did not receive notice of the October 24, 2018, "rehearing" as required by section 386; (6) Commissioner Hoffman erred in considering father's criminal status when finding the parent-child bond exception did not apply after having found the exception did apply at the July 11, 2018, hearing; and (7) the cumulative effect of the court's numerous errors was highly prejudicial. In the end, he contends the court's October 24, 2018, orders terminating his parental rights must be reversed and the July 11, 2018, orders finding the parent-child bond exception applicable (§ 366.26, subd. (c)(1)(B)(i)) reinstated.

The Department concedes all of the issues raised by father, but argues a different remedy is required, to wit, reversal of not only the October 24, 2018, orders but also the July 11, 2018, orders for failure to make accurate and complete findings as required by section 366.26, or alternatively for lack of sufficient evidence to support it. The Department argues the matter must be remanded for a new section 366.26 hearing to be conducted by a judicial officer other than Commissioner Hoffman.

As we shall explain, Commissioner Hoffman’s July 11, 2018, section 366.26 findings and orders were incomplete and the hearing was continued. Thereafter, Judge LaPorte granted the minors’ request for a stay of the proceedings rendering any and all section 366.26 findings and orders made thereafter void. Accordingly, the matter must be remanded for further section 366.26 proceedings.

*B. Analysis*

Section 366.26 provides the “exclusive procedures” by which a juvenile court must conduct a hearing either terminating parental rights or establishing a legal guardianship of the minors. (§ 366.26, subd. (a).) In particular, section 366.26, subdivision (b), provides that the court “shall make findings and orders in the following order of preference”: (1) order termination of parental rights; (2) order, without terminating parental rights, a plan of tribal customary adoption; (3) appoint a relative or relatives with whom the minor currently resides as legal guardian or guardians for the child, and order that letters of guardianship issue; (4) upon making a finding under subdivision (c)(3), identify adoption or tribal customary adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days; (5) appoint a nonrelative legal guardian for the child and order that letters of guardianship issue; (6) order that the child be permanently placed with a fit and willing relative, subject to periodic court review; or (7) order that the child remain in foster care, subject to specified conditions.

Father’s position after the July 11, 2018, hearing was, and his position here on appeal is, that the July 11, 2018, hearing and the court’s findings and orders rendered therein—i.e., that the parental bond exception applied, father’s parental rights would not be terminated, and guardianship was the appropriate permanent plan—constituted a final decision that could not be modified or changed. This point was hotly disputed. We conclude the record does not support father’s interpretation of the July 11, 2018, hearing. Instead, the record reflects that the court declined to terminate parental rights and

confirmed that guardianship was the permanent plan, but repeatedly continued the hearing to obtain information regarding placement options and to complete its findings and orders, suggesting the court itself was convinced it had not yet issued final orders.

In light of those circumstances, and in an abundance of caution, minors' counsel filed notices of appeal of the court's July 11, 2018, orders. We cannot fault counsel for doing so notwithstanding the dispute over the finality of the court's ruling, as the court did make *some* section 366.26 findings and orders. Appeal of these orders could have been precluded if it was later found to be a final ruling on section 366.26, since all postdisposition orders are appealable in dependency proceedings. (*In re S.B.* (2009) 46 Cal.4th 529, 532; see § 395.)

While the filing of an appeal does not automatically stay the section 366.26 proceedings (§ 395, subd. (a)(1); Code Civ. Proc., § 917.7; see *In re Christy L.* (1986) 187 Cal.App.3d 753, 758-759), the juvenile court has discretion to stay execution of the provisions of a judgment or order which awards, changes, or otherwise affects the custody of a minor child pending review on appeal or for any other period or periods that it may deem appropriate. (Code Civ. Proc., § 917.7.) Accordingly, at the September 12, 2018, hearing, minors' counsel requested and received a stay of the proceedings. The court (Judge J. LaPorte presiding) then continued the matter for further review pending the outcome of the appeal. No party challenged the stay.

Once the stay was imposed on September 12, 2018, the juvenile court retained continuing jurisdiction over matters regarding the minors that were not subject to the appeal, and to act to protect the safety of the minors. (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499 [“During the pendency of such an appeal, the trial court retains jurisdiction to make subsequent findings and orders during the pendency of the child's dependency case. [Citations.] Thus the trial court retains the authority and duty to make orders in accordance with the California dependency scheme while the reviewing court considers the issues raised on appeal”].) However, the stay divested the court of

jurisdiction to hear or decide issues related to section 366.26 until the stay was lifted or a remittitur issued by this court. According to our own records, of which we take judicial notice (Evid. Code, § 452, subd. (d)), the minors' appeal was dismissed on November 9, 2018, thus lifting the stay. Therefore, all section 366.26 findings and orders issued between imposition of the stay on September 12, 2018, and dismissal of the appeal on November 9, 2018, and in particular, the purported October 24, 2018, orders terminating father's parental rights, are void for lack of the juvenile court's jurisdiction.

As for the July 11, 2018, hearing, as previously discussed, the record makes plain that the court identified guardianship as the permanent plan but did not enter the required findings and orders under section 366.26. For example, section 366.26 requires that, "[i]f the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, subdivision (c) of Section 366.22, and subdivision (b) of Section 366.25 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. . . . The person preparing the assessment may be called and examined by any party to the proceeding." (§ 366.26, subd. (d).)

Here, there was no appointment of a legal guardian on July 11, 2018, nor did letters of guardianship issue, as confirmed by Commissioner Hoffman at the October 24, 2018, hearing. In fact, the court repeatedly stated the section 366.26 findings and orders were not complete following the July 11, 2018, hearing, thus requiring the continued hearing. This was emphasized by the Department's argument at the July 18, 2018, hearing that "we do not have an identified guardian for these children, Your Honor, so if the Court's order continues to be the guardianship, the plan for these children, they will need to be removed from the current caretakers, and I would request an evidentiary hearing on that issue." Because the July 11, 2018, section 366.26 hearing was incomplete, we must remand the matter to the juvenile court for a new section 366.26

hearing, during which the parties will not be prohibited from arguing the appropriate permanent plan for the minors, whether any exception to adoption applies, or whether parental rights should be terminated.

In light of our determination, we need not reach father's other claims of error. The issue of whether Commissioner Hoffman has authority to preside over any proceeding in the juvenile court, whether related to section 366.26 or not, has been resolved by the juvenile court's July 31, 2018, orders reassigning the case to a different department. Moreover, the juvenile court granted the minors' motion to withdraw the stipulation for Commissioner Hoffman to hear the matter. Accordingly, the parents' respective Code of Civil Procedure section 170.1 motions to disqualify filed October 24, 2018, are also moot.

### **III. DISPOSITION**

All findings and orders under section 366.26 entered after September 12, 2018, including the October 24, 2018, orders terminating father's parental rights, are vacated. The matter is remanded to the juvenile court to conduct a new section 366.26 hearing in accordance with this opinion.

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RENNER, J.

We concur:

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ROBIE, Acting P. J.

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DUARTE, J.